No. 21,020

IN THE

United States Court of Appeals

For the Ninth Circuit

ELISHA EDWARDS,
Appellant,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Appellee.

Appeal from Summary Judgment by the United States District Court for the Northern District of California

APPELLANT'S REPLY BRIEF

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FERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT

Jurisdiction of this court, in an appeal from a summary judgment entered by the United States District Court, rests upon 28 U.S.C. § 1291.[1] This appeal follows in timely and ordinary fashion from a final judgment entered below, and there is no disagreement between the parties hereto concerning the jurisdiction of this court.

[1]By error, Appellant's Opening Brief referred to 28 U.S.C.A. §225 as conferring jurisdiction upon this court. There being no such section in Title 28, the citation should properly have been to §1291.

STATEMENT OF THE CASE

The facts of this case are reviewed in Appellant's Opening Brief and are acquiesced in by appellee in its brief.

In addition to the references set forth in the Opening Brief (A.O.B. p. 14), it has since been learned that appellee holds itself out to the public by means of classified telephone directories under the heading "Railroads" in Cincinnati, Ohio (June, 1966, page 534), Cleveland, Ohio (April, 1966, page 809), Denver, Colorado (July, 1966, page 643), Detroit, Michigan (September 1966, page 1164), Kansas City, Kansas and Missouri (February, 1967, page 620), Pittsburgh, Pennsylvania (December, 1966, page 636), Portland, Oregon (1966-1967, page 629), Salt Lake City, Utah (June, 1966, page 356), Seattle, Washington (March, 1966, page 584) and Tucson, Arizona (June, 1966, page 319), and under the heading "Railroad Companies" in Minneapolis, Minnesota (November, 1966, page 557) and Sacramento, California (January, 1967, page 576).

STATEMENT OF THE ISSUE

The question on appeal remains as set forth in Appellant's Opening Brief—the applicability of the language of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to appellee.

SUMMARY OF ARGUMENT

1. Modern judicial guidelines combined with the facts of appellee's business activities show that appellee is a common carrier by railroad within the Federal Employers' Liability Act. Appellee has not denied the truth of the facts which establish its character as a railroad. Since appellee does not operate within the scope of any state regulatory program and does function under the jurisdiction of the Interstate Commerce Commission, appellee is in a class with common carriers by railroad.

2. The early decisions cited as authoritative by appellee have been devitalized by the expansion of Congressional activity in the field of interstate commerce. Further, Congress has never evinced any desire to exclude appellee from the uniform program of regulation of common carriers by railroad.

ARGUMENT

I. APPELLEE CANNOT DISTINGUISH ITS OPERATIONS FROM THOSE OF OTHER COMMON CARRIERS BY RAILROAD.

> The language of the FELA is at least as broad and all-embracing as that of the Safety Appliance Act of the Railway Labor Act, . . . If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, *in the absence of express provisions to the contrary,* that it intended to exclude a particular

group of such workers from the benefits conferred by the Act. *Parden v. Terminal R. of Alabama Docks Dept.,* 377 U.S. 184, 189-190, 84 S.Ct. 1207, 12 L.ed.2d 233 (1964). (Italics added.)

The language of the United States Supreme Court in the *Parden* decision cannot be lightly dismissed since it specifies in unambiguous terms the activities which bring a railroad operation within the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., and again expresses the broad reach of that Act through the phrase "common carrier by railroad." The true significance of *Parden* lies in the Court's recognition of the clear Congressional desire "to cover all rail carriers that constitutionally could be covered" (377 U.S. at 187, fn. 5) and the modern practice of the courts to apply the Act uniformly.[2] Since the F.E.L.A. does not set any precise standards to determine what businesses are common carriers by railroad, such contemporary determinations as *Parden* must control in analyzing the true nature and significance of appellee's operations. Appellee makes no effort to present any more definitive authority than *Parden;* nor does appellee deny engaging in any of the operations used in that decision to characterize a railroad company.

Appellant has not suggested that a railroad is defined by any one of its many operations. Rather, it is manifestly the cumulative nature of the enterprise

[2]Cf. *Reed v. Pennsylvania Railroad Co.*, 351 U.S. 502, 76 S.Ct. 958, 100 L.ed. 1366 (1955), and *Southern Pacific Co. v. Gileo,* 351 U.S. 493, 76 S.Ct. 952, 100 L.ed. 1357 (1955), as modern examples of the sweep of the F.E.L.A., including activities far more remote from the movement of trains in interstate commerce than those of appellant in this case.

which controls. While not dispositive of this case by itself, for example, appellee's operation of refrigerated vans in addition to railroad cars shows an effort by appellee to offer broad transportation services to the public as opposed to limiting its business to the servicing of refrigerator cars for other railroads. Appellee's car distribution, diversion and passing operations establish the clear degree of *control* which appellee exerts over the interstate carriage of goods by rail—as much as if appellee itself were providing the motive power for the trains—and negates any claim that appellee limits itself to providing a static or auxiliary service to railroads. Appellee's characterization of its own operations publicly as a "railroad" or "the first family of perishable transportation" adds to the total picture and invalidates the posture which appellee seeks to assume before the courts.

Appellee's only answer to the array of railroad operations set out in the Opening Brief consists of an effort to examine each point individually and ignore completely the total picture. Recognizing that this approach does not alter the impact of the Record, appellee then attacks the validity of its own publications and advertising. (Appellee's Brief, p. 16.) In fact, the materials submitted through the declaration of Leland P. Jarnigan (TR 69 et seq.) are properly before this court. Their authenticity is established by the declaration (and unquestioned by appellee), and their effect is to expose the insufficiency of the affidavit of W. G. Cranmer submitted on behalf of appellee below. Appellee cannot seriously challenge the use of these docu-

ments, especially since it resorts to these materials in its brief (p. 13) to describe its own operations thereby showing conclusively that the affidavit of Mr. Cranmer does not present a sufficiently detailed view of Pacific Fruit Express Company.[3] Suffice it to say that appellee has not denied the truth of any of the facts appearing in the materials filed by appellant. Neither does appellee dispute that it holds itself out to the general public as a railroad in telephone directories in a multitude of cities. The use of telephone directory advertisements as corroborating evidence is not a new or novel concept. See *Hood v. Bekins Van & Storage Co.,* 178 Cal. 150, 172 Pac. 594. Since a federal appellate court has the power to notice judicially facts which are generally known and accepted, *Mills v. Denver Tramway Corp.,* 155 F.2d 808 (C.C.A. 10), appellant urges that the existence of certain words in books in general circulation is properly brought to this court's attention.[4]

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[3]It is surprising that appellee, although it did not object to the use of these materials at the trial level, now objects to appellant's use of these statements under the established evidence doctrine of admissions against interest. Advertisements by railroad companies specifically have been found to constitute admissions against interest to be treated the same as any other admission; such evidence is not rendered any less significant by the contention that it was only an advertisement to catch the credulous public. *Southern Pacific Co. v. Allen,* 48 Tex.Civ.App. 66, 106 S.W. 441; *Southern Pacific Co. v. Godfrey,* 48 Tex.Civ.App. 616, 107 S.W. 1135. It should be noted that appellee strenuously urged the acceptance of *self-serving* hearsay (i.e., many of the statements in Mr. Cranmer's affidavit which are clearly beyond his personal knowledge) in *Aguirre v. Southern Pacific Co.,* 232 Cal.App.2d 636, 43 Cal.Rptr. 73, TR 30-31.

[4]"We are of the opinion . . . that the fact that the regular issues of the directory of the telephone company are 'brought home to the public' is a matter of such common knowledge that there was no necessity for testimony with respect thereto." *Barron v. Board of Dental Examiners,* 44 Cal.App.2d 790, 795, upholding

Since this matter arises on summary judgment, doubts as to the sufficiency of the evidence of any essential fact should be resolved against appellee. Cf. *Wilson v. Bittick,* 63 Cal.2d 30, 34-35, 45 Cal.Rptr. 31, 403 P.2d 159.

Appellee, although engaged in the common carriage of goods in interstate commerce, currently appears to enjoy the rather singular privilege of being responsible to no government, state or federal. This peculiar status is plainly unintended by either state or federal legislatures which have uniformly sought to regulate all instrumentalities directly affecting the movement of goods. Appellee's sugestion that it functions within the scope of state legislation alternative to the F.E.L.A. (p. 18) is without merit. The fact that Pacific Fruit Express attempts to restrict its California employees to an administrative compensation remedy has no effect on this action, cf. *Carroll v. Lanza,* 349 U.S. 408, 75 S.Ct. 804, 99 L.ed. 1183 (1955), is not properly evidence of the nature of appellee's activities, *Tipton v. Socony Mobil Oil Co.,* 375 U.S. 34, 84 S.Ct. 1, 11 L.ed.2d 4 (1963), and does not accurately state appellee's exposure to damage actions in the various states in which it does business. In many jurisdictions, the state administrative compensation schemes are optional and may be waived in favor of a civil action against the employer.[5] In the

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the administrative suspension of a dentist's license to practice because of advertising appearing in the telephone directory. See also California Evidence Code §§ 451(f), 452(h), 453 and 459, for the rules of judicial notice applicable currently in California.

[5]See, for example, Ariz.Rev.Stats. §23-906, Kansas Stats.Anno. §44-543, Nebraska Rev.Stats. §48-112.

area of substantive regulation, moreover, appellee is silent in the face of statutes of six states in the Ninth Circuit which classify appellee as a common carrier by railroad and thereby presumably impose attendant responsibilities. (A.O.B. 27-28.) By reporting to the Interstate Commerce Commission and not to any state utilities commission (TR 35), appellee plainly acts within the federal—not a state—regulatory system.

Appellee has not denied that it engages in a range of activities in interstate commerce far wider in scope than the mere icing of railroad cars. Rather, appellee carefully avoids taking a broad view of its operations, approaches each activity individually and cites authority only for the proposition that no single activity alone makes appellee a railroad. Two examples should suffice to show the specious nature of this analysis. Appellee dismisses the character of the equipment owned as not decisive of the issue (Appellee's Brief p. 13), citing *Ellis v. Interstate Commerce Commission,* 237 U.S. 434, 35 S.Ct. 645, 59 L.ed. 1036 (1914). Appellee ignores the limitation of the holding in *Ellis* to the duties of the "owners and builders" of the instrumentalities of transportation. More significantly, appellee now concedes tacitly that it deals directly with the public (Appellee's Brief pp. 13-14) but notes that Railway Express Company deals directly with the public.[6] This is apparently a reference to *Fleming v. Railway Express Agency,* 161 F.2d 659

[6]It is noteworthy that most essential to the decision in *Gaulden v. Southern Pacific Co.,* 78 F.Supp. 651, was the finding that "Pacific Fruit Express Company transacts none of its protective service business directly with the shippers." (78 F.Supp. at 654.)

(C.C.A. 7), which held that the F.E.L.A. did not apply to that express company *even though Railway Express Agency was in fact a common carrier.* The distinguishing factor was the lack of ownership and operation of railroad equipment. It is obvious that the fact that appellee combines the activities of both Armour Car Lines and Railway Express Agency must mitigate in favor of the application rather than the exclusion of F.E.L.A. coverage for its employees.

II. THE ACTIONS OF CONGRESS AND THE COURTS REQUIRE APPLICATION OF THE FEDERAL EMPLOYERS' LIABILITY ACT IN THIS CASE.

Appellee relies in its brief upon a series of decisions which have essentially lost whatever vitality they once may have had. *Ellis v. Interstate Commerce Commission,* 237 U.S. 434, 35 S.Ct. 645, 59 L.ed. 1036 (1914), *Chicago Refrigerator Co. v. I.C.C.,* 265 U.S. 292, 44 S.Ct. 645, 59 L.ed. 1036 (1923), and *United States v. Fruit Growers Express Co.,* 279 U.S. 363, 49 S.Ct. 374, 73 L.ed. 739 (1929), all dealt with questions long since put to rest by the monumental changes which have since occurred in the area of interstate commerce, not the least of which was the amendment of the Interstate Commerce Act in 1940, 54 Stat. 898 et seq., providing a completely integrated regulatory system over common carriers in the United States.[7] In none of these cases was the F.E.L.A. in issue. In each case, the intent of the Court to diminish rather than

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[7] *United States v. Pennsylvania R. Co.,* 323 U.S. 612, 65 S.Ct. 471, 89 L.ed. 499 (1944).

expand the impact of Congressional regulation was evident. All three decisions were basically negated by the 1940 Interstate Commerce Act amendment, 54 Stat. 917, which required the companies involved to report to the Commission in the same manner as all other instrumentalities of interstate common carriage in the United States. It is undeniable that modern concepts have ousted those notions of interstate commerce which prevailed in the first third of this century; it is no longer appropriate that outdated and restrictive decisions be used in an effort to impede broad remedial legislation such as the F.E.L.A.

Except for eliminating certain common law defenses and extending the F.E.L.A. into certain intrastate operations of common carriers by railroad, Congress has not change the F.E.L.A. since 1908. In the 1939 amendments, Congress made no effort to define further the broad phrase "common carrier by railroad" which has been used throughout the life of the Act. In view of the fact that the question of including refrigerator car operations under the F.E.L.A. did not arise until *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp. 651 (N.D.Calif.), in 1948, it seems unreasonable to place any construction in this regard on the 1939 actions of Congress. At best, the doctrine of legislative acquiescence is only an "auxiliary tool for use in interpreting ambiguous statutory provisions." *Jones v. Liberty Glass Co.,* 332 U.S. 524, 533, 68 S.Ct. 229, 92 L.ed. 142 (1947). It should not properly be used in a situation where Congress was not confronted with any decisions directly in point in which to acquiesce. The

comprehensive scheme of railroad regulation statutes enacted in conjunction with and after the F.E.L.A. (see discussion A.O.B. pp. 19-21) is far more reliable in showing the broad intention of Congress; subsequent legislation is a less contrived guide in interpreting earlier legislation on the same subject. *Great Northern R. Co. v. United States,* 315 U.S. 262, 62 S.Ct. 529, 86 L.ed. 836 (1942). Congress is not expected to act every time a court misconceives its intentions. See, for example, *Jones v. Liberty Glass Co., supra,* 332 U.S. 524, 534; *U.S. v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.ed.2d 805 (1963); *U.S. v. Welden,* 377 U.S. 95, 84 S.Ct. 1082, 12 L.ed.2d 152 (1964).

During the discussion of the 1939 amendments, there was some consideration given to including enterprises plainly outside the phrase "common carrier by *railroad.*" Since the Senate report gave no reason for the decision to delete these groups from the proposed amendment other than a lack of "necessity" or "demand" (TR 64), any speculation regarding the intent of Congress in so acting tends to introduce rather than eliminate ambiguity in the construction of the Act.[8] More significantly, companies such as appellee herein were not discussed in any context in the 1939 amendments, thereby precluding the drawing of any reliable inference on this question. Appellee, however, places a construction upon Congressional activity in the area of

[8]Committee reports are of value only where the meaning of Congress is doubtful and reference to such reports resolves, rather than creates, an ambiguity. *United States v. Shreveport Grain & Elevator Co.,* 287 U.S. 77, 53 S.Ct. 42, 77 L.ed. 175 (1932).

railroad legislation which suggests a Congressional intent to create conflict and inconsistency in this field. In view of the fact that the Federal Employers' Liability Act does not exist in a vacuum but is a part of a comprehensive legislative program, it is highly unlikely that Congress intended to introduce any ambiguity into this area.

CONCLUSION

In each instance where appellee has been excused from the operation of the F.E.L.A., the decision in *Gaulden v. Southern Pacific Co., supra,* 78 F.Supp. 651, has been accepted uncritically as dispositive of the issue, and subsequent rulings are only as strong as the analysis in *Gaulden.* It must be emphasized that there is no modern authority which considers the F.E.L.A. in terms of the facts heretofore established regarding appellee. A full examination of the facts of appellee's activities in light of modern judicial trends reveals the double image adopted by Pacific Fruit Express. To the public, appellee acts, looks and operates as a common carrier by rail. In litigation, appellee struggles to fit the image of a peripheral service enterprise divorced from the transportation of goods. The interests of justice require that the exploration of appellee's activities be complete and not stop with a superficial and uncritical acceptance of appellee's self-serving posturing. Appellant respectfully urges that the point has been reached where "this court should

not be ignorant as judges of what (it knows) as men."[9]

The question must be asked whether appellee is now denying that it is a common carrier or that it operates by railroad. If express companies are common carriers, *Fleming v. Railway Express Agency, supra,* 161 F.2d 659 (C.C.A. 7); *Jones v. New York Central,* 182 F.2d 326 (C.A. 6), terminal companies are common carriers, *Fort Street Union Depot Co. v. Hillen,* 119 F.2d 307 (C.C.A. 6); *McCabe v. Boston Terminal Co.,* 303 Mass. 450, 22 N.E.2d 33, and refrigerator car companies are common carriers, California Public Utilities Code §§ 229, 230, 211, then surely appellee is a common carrier. It is not denied by appellee that it acts in interstate commerce; nor does appellee deny its extensive ownership and operation of equipment which is common only to railroad companies. It is respectfully urged that the judgment of the District Court be reversed and that this cause be remanded for trial upon the merits under the Federal Employers' Liability Act.

Dated, San Francisco, California,
April 17, 1967.

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[9]Justice Frankfurter, writing in *Watts v. Indiana,* 338 U.S. 49, 52, 69 S.Ct. 1347, 93 L.ed. 1801 (1949).

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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